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No. 91-1156

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In The

Supreme Court of the United States

October Term, 1991

JOSEPH J. LOCRICCHIO and GARY FRANCELL,

Petitioners,

vs.

THE EVENING NEWS ASSOCIATION, INC., MICHAEL F. WENDLAND and JEAN GADOMSKI,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this public interest libel case, where petitioners conceded that they could not prove false any specific statement contained in the disputed articles, and where petitioners conceded that their names appeared on law enforcement organized crime lists, that they had personal friendships with numerous individuals whose names are commonly associated with organized crime, and that they had extensive business dealings with those individuals, did the Michigan Supreme Court err in holding that petitioners failed to sustain their burden of proving false the implication allegedly arising from the articles that petitioners had "some kind of connection with organized crime?"

CERTIFICATE PURSUANT TO SUPREME COURT RULE 29.1

At all times relevant, respondents Michael Wendland and Jean Gadomski were reporters for The Detroit News, and the Evening News Association was the publisher of The Detroit News.

On February 18, 1986, The Evening News Association merged with Gannett Michigan, Inc., with The Evening News Association being the surviving corporation. On February 19, 1986, The Evening News Association changed its name to The Detroit News, Inc., and it has been the publisher of The Detroit News since that date. The Detroit News, Inc. states that (1) it is a wholly owned subsidiary of Gannett Co., Inc.; (2) it has no subsidiaries other than wholly-owned subsidiaries; and (3) its affiliates are the other subsidiaries of Gannett Co., Inc.

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STATEMENT OF THE CASE

Introduction

In a four-part newspaper series beginning on April 22, 1979, and running through April 25, 1979, The Detroit News reported on the development by petitioners Gary Francell and Joseph Locricchio of the Pine Knob resort in southeastern Michigan. The series ("The Pine Knob Series"), investigated over several months by two veteran Detroit News reporters, Michael Wendland and Jean Gadomski, culminated with a one-and-a-half hour taped interview with Locricchio, Francell, and their attorney in which petitioners openly discussed their relationships with organized crime figures and the role of organized crime in the financing of Pine Knob.

Despite their inability to prove a single published statement in the Pine Knob Series false, petitioners nonetheless contend that the articles falsely "portrayed Locricchio and Francell as members or associates of the Mafia, linked them with two unsolved murders, and suggested that their development and operation of Pine Knob had involved them in a series of questionable and/or illegal financial transactions." (Pet. 7)[1] Notwithstanding petitioners' contention, the trial record demonstrated that Joseph Locricchio and Gary Francell associated with organized crime figures, borrowed money from and laundered money through organized crime figures, did business with organized crime figures, were linked with two unsolved murders, and conducted their lives to the point that — as Joseph Locricchio himself told The Detroit News — they were listed on federal law enforcement computers as "suspected organized crime figures."

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1. The following abbreviations are used in this Brief: "Pet." for the petition for a writ of certiorari; "Pet. App." for the appendix filed with the petition; "Mich. App." for the appendix filed by respondents with the Michigan Supreme Court; and "Resp. App." for the appendix filed with this brief in opposition.

I. Prior Proceedings

On March 14, 1980, ten months after publication, petitioners demanded a retraction; on April 3, 1980, petitioners filed suit. Petitioners sued over the Pine Knob Series and seven other Detroit News reports published between April 27, 1977, and April 25, 1979. Two amended complaints were subsequently filed. Although all versions of the complaints contained multiple counts and alleged multiple causes of action, the libel counts were the focus of the litigation.

None of the complaints identified any specific factually false statements printed in any of the eleven Detroit News reports.

In April, 1981, respondents moved for summary judgment, *inter alia,* asserting the complaint's failure to specify specific false and defamatory statements. The motion was denied.

Respondents filed interrogatories requesting petitioners to "Identify with particularity each and every statement [in each of the respective articles in the Series] you claim contains false statements of fact . . . ." Petitioners objected to this set of interrogatories, but the court denied petitioners' objections. Petitioners then answered as follows:

> In regard to Interrogatory 1(a), plaintiffs, JOSEPH JUDEAS LOCRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that the defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that

> plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the "Mafia"; individuals of low moral and character [sic]; that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.

(Mich. App. 80a).

Respondents again moved for summary judgment on the grounds that petitioners had failed to identify a single false statement of fact in the entire Pine Knob Series. Petitioners opposed the motion on the basis that the allegedly false implications and innuendos arising from the publications could support a libel claim despite the absence of alleged false statements of fact. The circuit court denied respondents' motion.

The Michigan Court of Appeals granted respondents' application for interlocutory appeal, but held that the pleadings raised a genuine issue as to whether the articles carried a defamatory insinuation that petitioners were associated with organized crime. (Pet. App. A-82) Respondents' motion for rehearing and interlocutory application for leave to appeal to the Michigan Supreme Court were denied. Respondents filed an interlocutory petition for certiorari in this Court, which was also denied.

Trial proofs began on July 22, 1985. At the conclusion of all proofs, the court granted respondents' motion for directed verdict as to all remaining counts except the libel counts and as

to all eleven publications except the Pine Knob Series. The court took the motion, as it pertained to the Pine Knob Series, under advisement.

On September 4, 1985, the jury returned special verdicts finding respondents did not "make the statement of fact complained of . . ." as to petitioner Locricchio, but finding for petitioner Francell in the amount of three million ($3,000,000) dollars. (Pet. App. A-192)

Following post-trial briefing, the trial court issued a written opinion on December 11, 1986, directing a verdict in favor of respondents on the petitioners' libel claims. The trial court "accepted the facts as submitted by plaintiff" and "viewed the evidence in the light most favorable to plaintiff." (Pet. App. A-91) Against this standard, the trial court held that "The Plaintiffs have failed to prove [that the Pine Knob Series] contained significantly false facts." (Pet. App. A-88) The trial court noted that petitioners "urge[d] the Court to disregard the underlying facts" and that petitioners argued the "inferences which may be drawn from the articles . . . comprise the false statements constituting the defamation." (Pet. App. A-89) The trial court rejected this argument holding that ". . . inference may be as defamatory as a direct assertion . . . [but] liability cannot be imposed for journalistic inferences arising from the reporting of true facts about matters of public concern." (Pet. App. A-89) In Appendix C to its opinion, the trial court listed fourteen facts which are true — or at least petitioners have not proven false — including:

- Petitioners purchased Pine Knob from individuals who had been indicted for concealing their ownership in a Las Vegas hotel;

- Petitioners' names appeared on the organized crime lists;

- Petitioners were personal friends of or had done business with innumerable persons whose names are commonly associated with organized crime.

(Pet. App. A-108-A-110).

Petitioners appealed to the Michigan Court of Appeals, which reversed. The court of appeals did not consider the trial record. Instead, it ruled that its 1983 pretrial opinion, holding that the Pine Knob Series was capable of defamatory interpretation, constituted the law of the case and was dispositive. (Pet. App. A-119) Respondents' motion for rehearing was denied.

The case was accepted for review by the Michigan Supreme Court. On August 26, 1991, the Michigan Supreme Court issued its opinion reversing the court of appeals' decision and reinstating the trial judge's directed verdict.

The court's ruling, expressed in an opinion by four of the six sitting Justices and a concurrence by the Chief Justice, was based on petitioners' admitted failure to prove falsity of the statements published by The Detroit News. The four-justice majority of the Michigan Supreme Court concluded that there was "a lack of proven falsity" in "the underlying facts." (Pet. App. A-4) Chief Justice Cavanaugh agreed, stating that "plaintiffs have conceded the truth — or at least that they are unable to prove the material falsity — of all the *specific factual statements* contained in the four disputed articles." (Pet. App. A-51 (emphasis in original)) Indeed, at oral argument, petitioners' counsel conceded that "the literal words used is not what we're basing our complaint on . . . " (Resp. App. A-1)

The Michigan Supreme Court further concluded that petitioners failed to prove that the Pine Knob Series created any false implications: "[u]nfortunately for plaintiffs, an inescapable

implication of the Pine Knob series conforms to the facts developed at trial: the plaintiffs had numerous financial and social connections with organized crime figures and these associations contributed in the financing of Pine Knob and prompted intense investigative scrutiny, if not harassment, from law enforcement authorities." (Pet. App. A-43)[2] Petitioner's motion for rehearing was denied.

II. Statement of Facts

Introduction

Petitioners contend that, "viewed in their entirety, the articles portrayed Locricchio and Francell as members or associates of the Mafia, linked them with two unsolved murders and suggested that the development and operation of Pine Knob had involved them in a series of questionable and/or illegal financial transactions." (Pet. 7)

In summary, the relevant trial proofs showed that:

- Petitioners purchased Pine Knob on land contract from a partnership in which two of the partners were named in a federal Organized Crime Strike Force indictment. This caused the FBI and police to open investigative files on petitioners.
- Almost immediately after purchasing Pine Knob, petitioners needed additional cash. They borrowed $200,000 and hid the source of the loan with the assistance of a Toronto organized crime associate.

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2. At trial, petitioners offered only one witness to testify concerning the implication of the Pine Knob Series. Robert Bjork, petitioners' psychologist expert witness, opined that the implication of The Detroit News' article was that petitioners have "some kind of connection with organized crime." (Pet. App. A-17)

- Four months later, the bookkeeper of the $200,000 lender was found murdered. Petitioners' names surfaced in the investigation of that murder.

- Petitioners were also social and business associates of one Harvey Leach, whose company had financial connections with the same individuals who had arranged the prior loan. Leach was subsequently found murdered in the trunk of his car.

- The continuing law enforcement interest in petitioners also stemmed from their financial and business relationships with identified organized crime figures. Petitioners purposely disregarded an FBI warning to stay away from these figures and from a development role in the Aladdin Hotel in Las Vegas.

- Petitioners were subpoenaed to numerous grand juries and were ultimately indicted for loan fraud. Eventually, petitioners pled guilty to a lesser charge in connection with the hidden loan. Throughout this period, petitioners' names appeared on the organized crime lists of the FBI and petitioners complained of FBI "harassment."

A more detailed analysis of these relevant trial proofs follows.

A. The Purchase of Pine Knob

In December, 1971, petitioners purchased the Pine Knob ski hill on land contract financing from a partnership in which two of the partners were named in a federal Organized Crime Strike Force indictment for attempting to purchase hidden interests in a Las Vegas hotel and casino for two individuals who had been identified in United States Senate testimony as the heads of the

Detroit Mafia. (Mich. App. 194a-195a, 245a-249a)[3] These partners financed over one million dollars of the $1,550,000 total purchase price. (Mich. App. 400a-407a) In December of 1971, the Michigan State Police Intelligence Unit opened a file on petitioners (Mich. App. 769a-770a); in January of 1972, the Federal Bureau of Investigation opened a file on petitioners (Mich. App. 748a).[4]

Following this purchase, petitioners vastly expanded Pine Knob. They added condominiums, restaurants, golf facilities, and an outdoor music theater. These expansions resulted in a series of financial crises, one of which led to the "Magill loan."

B. The Magill Loan

In July, 1972, Locricchio and Francell became, in their words, "desperate" for cash. (Mich. App. 214a and 376a) Through an associate, they were connected to William and Joyce Magill, who, while unacquainted with Locricchio and Francell, agreed to loan them $200,000.00 in currency. (Mich. App. 376a) According to Locricchio, Magill did not want to be known as ths source of this loan. (Mich. App. 377a)

To hide the source of the loan, petitioners turned to a man

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3. In the past, petitioners have argued that they first purchased land for Pine Knob from a physician rather than from anyone associated with organized crime. The land records, purchase agreement, and petitioners' own contemporaneous financial statements confirm, however, that the ski hill, bought from the partnership, was the first property purchased by the petitioners. (Mich. App. at 408a, 414a, 619a, and 626a-630a)

4. At various times and continuing in this Court, petitioners have claimed that rumors of organized crime at Pine Knob were created by a February 1972 Detroit News sports columm. (Pet. 9) Uncontroverted trial testimony by the FBI and Michigan State Police established that their investigations of petitioners predated the sports coverage. (Mich. App. 748a, 769a-770a)

named Fred Gordon, who arranged for Francell to drive the Magills' $200,000.00 in currency to Toronto. In Toronto, the $200,000.00 in currency was given to one Joseph Burnett as "collateral" for a $200,000.00 "loan" from Burnett's company. Burnett has been identified as a known associate of organized crime figures, including Mafia financial wizard Meyer Lansky. Petitioners returned to Detroit with a $200,000.00 Canadian loan; the Magills had been washed from view as a source of the loan. (Mich. App. 421a-422a, 378a-382a, 214a-217a, and 219a-220a) According to Locricchio, this loan was finally paid off in 1977 when the Magills sued because they "wanted the FBI off their back." (Mich. App. 384a)

C. The Agnes Brush Murder

In October of 1972, Magill's bookkeeper and sister-in-law, Agnes Brush, was found slain at Magill's office. Petitioners' names surfaced in the investigation of that murder. In discussing the Brush murder with The Detroit News reporters, Locricchio stated: "I think that's how the FBI got involved with us [with regard to the Magill loan]." (Mich. App. 219a) It should be noted that the Pine Knob Series stated that "[t]he only suspect was the 61-year-old laborer who worked with Miss Brush." (Pet. App. A-123)

In 1973, petitioners were subpoenaed by the United States Organized Crime Strike Force to the first of a series of federal grand jury appearances. At the trial of this matter Locriccio testified that, during several days of 1973 grand jury testimony, he was questioned about partnerships with known Detroit organized crime figures (Mich. App. 447a-450a, 270a), and both he and Francell were required to produce information and records related to Pine Knob, their banking records, and the Magill loan. (Mich. App. 279a-282a, 537a-542a) By March of 1973, petitioners would complain to the FBI that they "were tired" of hearing rumors that "organized crime or mafia" was connected with their

business. (Mich. App. 450a-452a)

D. The Harvey Leach Murder

In 1974, petitioners became involved in building warehouse-type furniture outlets with Harvey Leach, the then-President of the Joshua Doore Furniture chain in Detroit. They were introduced to Leach by Fred Gordon. (Mich. App. 572a-579a) According to Locricchio, he and Leach had become "as close as we could get . . . " (Mich. App. 218a)

Gordon had also introduced petitioners to an ex-convict named Leonard Schultz who was a "labor consultant" to the Doore Chain and Harvey Leach. (Mich App. 198a) In 1969, petitioners, through Gordon, had obtained a $129,000.00 unsecured loan from Schultz. (Mich. App. 366a-367a) Schultz was a friend and confidant of identified organized crime figures in Detroit.

In March, 1974, Leach was found almost decapitated in the trunk of his car. He had last been seen en route to a meeting at Schultz' home. (Mich. App. 197a-198a) Schultz came into the public eye again in 1975 when he was identified as one of the men that Jimmy Hoffa said he was to meet the day he disappeared. (Mich. App. 199a-200a)

The Leach murder, which was the subject of state and federal investigations, remains unsolved. Days prior to Leach's murder, Fred Gordon had arranged new financing for the Doore chain through the same Joseph Burnett who had participated in hiding the source of the Magill loan. (Mich. App. 294a, 250a-251a) In 1977, these business and personal connections involving Locricchio and Francell, Gordon, the Magills, Schultz, Burnett, and Leach had been broadcast in detail by the Canadian Broadcasting Corporation in an organized crime expose called "Connections: A Study of Organized Crime in Canada."

In 1975 petitioners again were subpoened to federal grand juries. (Mich. App. 448a-447a, 645a-646a)

E. The James Tamer and Aladdin Hotel Connection

Part of the continuing law enforcement interest in petitioners stemmed from their financial and business relationships with James "Occo" Tamer, a convicted bootlegger, bank robber, bookmaker, and gambler with high level organized crime associations. (Mich. App. 300a-306a, 267a, 268a) Locricchio described Tamer as a "very good friend of mine." (Mich. App at 392a) On several occasions in 1975 Tamer loaned petitioners money at a time when they were "shut out" of bank financing. (Mich. App. 395a-396a)

Also in 1975, Tamer, then the entertainment director of the Aladdin Hotel and Casino in Las Vegas,[5] asked Locricchio to design and build a performing arts center there. (Mich. App. 434a-436a) An FBI agent had told Locriccio that the FBI was investigating organized crime involvement at the Aladdin Hotel and Casino.[6] Locricchio acknowledged that he purposefully disregarded an FBI warning to stay away from Tamer, the Aladdin, and the "bad people" out there. (Mich. App. 271a-275a, 309a-315a) According to Locricchio, his response to this advice was to tell the FBI agent " . . . to get fucked. And don't ever come back. Don't ever get in my face again." (Mich. App. 225a) Locricchio moved to Las Vegas and designed and built a multi-million-dollar entertainment center for the Aladdin. Locricchio's

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5. A position shortly thereafter to be occupied by entertainer Wayne Newton and the subject of another libel suit. *Carson Wayne Newton v. NBC*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 192 (1991).

6. This investigation culminated in 1978 with the indictment and later conviction of Tamer, and other individuals linked with Detroit organized crime, on charges relating to hidden interests in the Aladdin Hotel.

fees from the Aladdin project were funneled into Pine Knob. (Mich. App. 444a-445a)

F. The Claims of FBI Harassment

In 1975, ths FBI subpoenaed records from at least four of petitioners' banks and interrogated banking personnel. According to Locricchio, the FBI harassment was a "pretty consistent thing at that point in time in my life." (Mich. App. 398a) Locricchio testified in court that the FBI had told third parties he was a "crook." (Mich. App. 270a-276a, 315a) Petitioners' attorney detailed FBI visits to several of petitioners' lenders at which the FBI reportedly told bank officials that petitioners were "mob." (Mich. App. 283a-286a, 326a-328a)

Petitioners' problems with banks were not limited to government harassment. A 1978 bank credit memorandum described petitioners as "high livers" and concluded that "It is suspected, although not factual they are involved in underworld activities" and "It is suspected that the business (Pine Knob) is used for the laundering of money." Another memorandum of the same bank documented a telephone call with another major Detroit bank reporting that "They are aware of certain underworld ties through associations the principals have had . . ." (Mich. App. 354a-355a, 359a-360a, 364a-365a)

G. The Indictment and Guilty Plea

In 1977, a federal grand jury handed up criminal indictments against petitioners on charges presented by the U.S. Organized Crime Strike Force (Mich. App. 453a, 809a-810a, 464a-467a) for loan fraud relating to petitioners' failure to reveal the Magill loan in a subsequent bank loan application. In October, 1978, Locricchio and Francell pleaded guilty in federal court in Detroit to a charge relating to the Magill loan. (Mich. App. 464a,

481a-508a; 484a, 505a, 533a-537a, 650a, 713a)

H. The Detroit News Investigation

In 1978, Wendland was assigned to investigate the rumors of organized crime involvement at Pine Knob. Respondent Wendland was a veteran Detroit News reporter with extensive experience covering organized crime both in Detroit and nationally. After some initial work in 1978, he advised his editors that researching Pine Knob would take time and resources not then available. The time and resources became available in January of 1979, when respondent Jean Gadomski was teamed with Wendland and they began their research into the Pine Knob story. Their pre-publication research efforts culminated in a prearranged, on-the-record, 1-1/2 hour taped interview with petitioners and their attorney in April, 1979. Following the interview, and another interview with petitioners' attorney in Chicago, they wrote the Pine Knob Series, which was published from April 25-29, 1979.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The Michigan Supreme Court did not have to look very far to determine that petitioners could not prove any specific factual statements to be false: petitioners conceded as much. As a result, the review conducted by the court was actually quite limited and was unquestionably proper. Nor did the court have to look very far to determine that the claimed implication as defined by petitioners' expert (*i.e.*, that they had "some kind of connection with organized crime") followed ineluctably from the true facts.

While petitioners decry the Michigan Supreme Court's action in reviewing the record to determine whether petitioners carried their burden of proving falsity, the court could have done no less.

See Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984):

> [W]e have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression."

The underlying logic of this simple requirement in First Amendment cases is inescapable. *See Bose,* 466 U.S. at 501, n.17:

> Regarding certain largely factual questions in some areas of the law, the stakes — in terms of impact on future cases and future conduct — are too great to entrust them finally to the judgment of the trier of fact.

Given petitioners' admitted failure to prove factual error in what had been published, the constitutional mandate to review the entire record, and the importance of the First Amendment values involved, the conclusion of the Michigan Supreme Court that petitioners had not borne their burden of proving falsity was not an impermissible intrusion upon the jury. To the contrary, this conclusion was the necessary consequence of petitioners' own admissions and the trial proofs.

I.

THE SUPREME COURT OF MICHIGAN DID NOT ERR IN THE STANDARD OF REVIEW IT APPLIED TO THIS CASE.

A. Due to Petitioners' Complete Failure to Prove Factual Falsity, the Review Conducted by the Supreme Court of Michigan Was Limited and Proper.

Petitioners state that the Supreme Court of Michigan "eviscerate[d] the role of the jury" and assumed "the role of super-jury and appellate fact-finder . . ." (Pet. 22) Petitioners suggest that the court below engaged in an unharnesssd and far flung reexamination of the trial record. This is a gross mischaracterization of what the Michigan Supreme Court said and did.[7]

In light of petitioners' admissions and the trial proofs, the Supreme Court of Michigan did not have to grapple with questions about the proper limits of independent appellate review.

1. Petitioners' Failure to Prove False Statements.

The court certainly did not have to conduct an extensive review to determine whether petitioners had proved any specific facts false. In interrogatory answers, petitioners never pointed to a single false fact in the entire series of articles. At trial, they proved no published statement false. In answer to questions in

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7. The court held that "in reviewing a libel verdict an appellate court does not and should not exercise review of credibility determinations, disregard previous factfindings, or create new factfindings." (Pet. App. A-25 n.17) The court further emphasized that "[t]he task of the reviewing appellate court in a libel case is not to conduct an inquiry regarding who did what to whom . . ." (Pet. App. A-26 n.17)

the Michigan Supreme Court, petitioners' counsel conceded that "the literal words used is not what we're basing our complaint on . . ." (Resp. App. 2a) Chief Justice Cavanaugh summarized the record: "plaintiffs have conceded the truth — or at least that they are unable to prove the material falsity — of all the *specific factual statements* contained in the four disputed articles." (Pet. App. A-51 (emphasis in original)) Thus, regardless of whether independent appellate review of falsity is generally required in public interest libel actions, in light of the unique admissions in this case such review was not required to conclude that petitioners failed to prove any specific published statement to be false.

2. Petitioners' Failure to Prove False Implications.

The petitioners' proofs were equally weak as to the false implications that they claimed arose from the Pine Knob Series. They offered no support for their claim that a reader of the Pine Knob Series would infer that they were "members of the Mafia." The cognitive psychologist expert petitioners produced to support this claim rejected it in his trial testimony. Rather, Prof. Bjork testified that the Pine Knob Series merely gave rise to an implication that petitioners "had some kind of connection with organized crime." (Pet. App. A-17) As the Michigan Supreme Court observed, the undisputed published facts proved that implication to be true:

> Unfortunately for the plaintiffs, an inescapable implication of the Pine Knob series conforms to the facts developed at trial: the plaintiffs had numerous financial and social connections with reputed organized crime figures and these associations contributed in the financing of Pine Knob and prompted intense investigative scrutiny, if not harassment, from law enforcement authorities. Although capable of defamatory

> interpretation, the implications alleged by the plaintiffs do no arise from false facts or material omissions, and, standing alone, are not even proven by the plaintiff to be false.

(Pet. App. A-43, A-44)

To support their implication claim, petitioners repeatedly suggest that Wendland did not believe they were members of the Mafia. (Pet. 5, 9) This is utterly beside the point since The Detroit News never stated that petitioners were Mafia and since petitioners' own expert, Prof. Bjork, did not conclude that the articles implied they were members of the Mafia. Furthermore, Wendland in fact testified as follows:

> I don't think there's organized crime involvement in the ownership of Pine Knob. *I think organized crime has been involved in the — in helping your clients finance Pine Knob,* and I also testified I don't think your clients are organized crime members. (Pet. App. A-136)

It can hardly be denied that organized crime connections played a role in the financing of Pine Knob, ranging from the land contract financing of petitioners' original purchase of Pine Knob, to taking a suitcase with $200,000 currency to a known organized crime associate in Toronto, to the loans from James Tamer when petitioners were shut out of the banks.

It is also impossible for any reasonable person to review the undisputed trial record without concluding that these petitioners were a target of the FBI and the United States Organized Crime Strike Force. As detailed in the Statement of Facts at 7 to 13, *supra,* law enforcement attention regarding petitioners began in

1971 and intensified through their indictment.[8] So pervasive was the law enforcement interest in them that Locricchio's voice can be heard in the tape recorded interview — as clear as a bell — summarizing the situation as follows:

> I know the surveillance is there, and they have me listed as a suspected organized crime figure.
>
> * * *
>
> I honestly believe sometimes my mother doesn't really think that somewhere in the background, you know. She, she said to me, would you have anything to do with them? After all, she's thinking, my god, why, why does it keep up and why the grand juries and why this and why the indictment. She said, tell me son, tell me, you know. So my mother, in the back of her mind, suspects, but she's absolutely mad and she's, you know, as far as hating, I mean, my mother is literally, she believes it but she has her moments of doubt.

(Mich. App. at 243a-244a)[9]

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8. Petitioners take issue with the headline stating that they were "stalked by Mafia hunters." As the preceding factual discussion reveals, however. this is a rational summary of what occurred: law enforcement agencies who pursued organized crime figures were, indeed, pursuing the petitioners. In any event, as the Michigan Supreme Court concluded, to the extent that the phrasing of this headline is "arguably inflammatory" is "falls into ths category of permissible rhetorical hyperbole.' (Pet. App. A-44, A45)

9. The Detroit News aptly summarized this rambling and ungrammatical statement as "even my mother sometimes has her doubts." (Pet. App. A-198) Petitioners state that Wendland "admitted" that this "was not an accurate report

(Cont'd)

Petitioners also contend that the Pine Knob Series "linked them with two unsolved murders." (Pet. 7) Again, however, petitioners' own expert witness on the implications of the Pine Knob Series did not support this claim. Rather, he testified that "I don't believe [readers] would necessarily conclude that Mr. Locricchio and Mr. Francell were involved personally in some way." (Pet. App. A-16) Further, the undisputed proofs show that there were numerous documented common elements in both of the murders involving individuals who had been involved with petitioners' business and financial transactions.[10] So remarkable are these common elements that petitioners themselves revealed them to their attorney, who in turn reported these revelations to Wendland and Gadomski during the pre-publication interview in petitioners' presence:

> They come into my office, sit down and . . . they start telling me these things (about the Magill loan and Leach's murder). Well, there's Harvey in the trunk of the car, and then we went to Toronto and . . . Holy smokes!

(Mich. App. 176a, 217a).

(Cont'd)
of Locricchio's remarks." (Pet. 6, n.2) To the Contrary, Wendland testified "I think that's an accurate quote of what Mr. Locricchio was telling us." (Pet. App. A-139)

10. Petitioners' statement that Wendland "admitted that he never encountered the partners' names during his investigation" [of the 1974 Leach murder] is wrong. Wendland testified that "I had attempted to talk to your clients back during the Harvey Leach story" because of their financial connection to Leonard Schultz who was the leading suspect. (Pet. App. A-127-A-129, Mich. App. 250a-251a) What Wendland did not learn until 1979 was petitioners' personal and business involvement with Leach (Pet. App. A-129) in the siting, design, and construction of the Joshua Doore stores.

In sum, this case does not present complex questions concerning the proper scope and interpretation of independent appellate review. Rather, this is a case in which any standard of review that examined the sufficiency of the evidence would have dictated the same result: that the "inescapable implication of the Pine Knob Series conforms to the facts developed at trial . . ." (Pet. App. A-43) Indeed, even the trial judge — who applied a standard under which the evidence was viewed in the light most favorable to plaintiffs — granted respondents' motion for directed verdict in light of petitioners' clear failure to prove falsity.

B. The Supreme Court of Michigan Correctly Interpreted the Decisions of this Court and the Doctrine of Independent Appellate Review.

Even if the doctrine of independent review were essential to the decision below, however, it is abundantly clear that the Supreme Court of Michigan correctly analyzed and applied that doctrine.

1. This Court Has Required Independent Review of Determinations that Speech Falls Within a Constitutionally Unprotected Category.

This Court has recognized that "the freedom to speak one's mind is not only an aspect of individual liberty — and thus a good unto itself — but also is essential to the common quest for truth and the vitality of society as a whole." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 48, 50-51 (1987) (*quoting Bose*, 466 U.S. at 503-504). Nevertheless, this Court has also held that "there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend." *Id.* at 504. Those unprotected categories include "fighting words," *Street v. New York*, 394 U.S. 578, 592 (1969), incitement to riot, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969),

obscenity, *Roth v. United States*, 354 U.S. 476, 487 (1957), child pornography, *New York v. Ferber*, 458 U.S. 747, 764 (1982), and libel, *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1982).

The question of whether a specific communication receives "the majestic protection of the First Amendment" is clearly one of constitutional moment. Accordingly, this Court has recognized that, whenever it is claimed that speech is unprotected, the First Amendment "imposes a special responsibility on judges" to "be sure that the speech in question actually falls within the unprotected category." *Bose*, 466 U.S. at 505. Hence, an appellate court must conduct an independent review of the record "to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505.

The Court first applied the doctrine of independent review to a libel case in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1984). In *New York Times*, this Court held that, when actual malice is at issue, an appellate court must conduct an independent review of the evidence in order to ensure that there has been no "forbidden intrusion on the field of free expression." *Id.* at 285. The Court reiterated this principle in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), in *Bose, supra*, and in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

2. This Court Has Held that Public Interest Speech Falls Within the Unprotected Category of Actionable Libel Only if it is False.

In *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), this Court held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id.* at 777. Just as *New York Times* made proof of actual malice

a constitutional requirement in public official plaintiff cases, so *Hepps* made proof of falsity a constitutional requirement in public interest cases:

> Here, as in *Gertz [v. Robert Welch, Inc.*, 418 U.S. 323 (1974)], the plaintiff is a private figure and the newspaper articles are of public concern. In *Gertz*, as in *New York Times*, the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity — that the defendant must bear the burden of proving truth — must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.

Id. at 775-776. The Court imposed this constitutional requirement "[t]o ensure that true speech on matters of public concern is not deterred . . ." *Id.* at 776.[11]

3. The Supreme Court of Michigan Properly Interpreted the Independent Review Doctrine as Applying to Determinations That Public Interest Speech Has Been Proved False.

The Supreme Court of Michigan combined the independent review doctrine of *New York Times* (and its progeny) with the

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11. Petitioners seem to suggest that the *Hepps* falsity requirement does not apply to "libel by implication" cases. (*See* Pet. 19) In support of this suggestion, petitioners cite this Court's opinion in *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990). The suggestion that the falsity requirement applies any less to implications than it does to statements is logically indefensible. Moreover, this argument rests on a patent misreading of *Milkovich*, which addressed actionable and non-actionable opinions rather than the type of "libel by true facts" theory that petitioners advance here.

plain meaning of *Hepps*, and concluded that "an independent appellate review of the burden of proof with regard to falsity in private figure, public-interest cases deters 'forbidden intrusion on the field of free expression' as a logical corollary to independent review of actual malice." (Pet. App. A-26) The Supreme Court of Michigan properly reasoned that "[a] jury verdict against the great weight of the evidence regarding the falsity requirement, unreviewed by a court, would . . . comprise a forbidden intrusion on protected speech, in the same way as would a failure to review for clear and convincing evidence of actual malice." (Pet. App. A-26, A-27)[12]

4. Petitioners' Objections to the Reasoning of the Supreme Court of Michigan Are Without Merit.

Petitioners raise several objections to the lower court's reasoning. Petitioners initially contend that the doctrine of independent review has only been applied where this Court has fixed "a category of unprotected speech within substantive constitutional limitations," such as the categories of obscenity and fighting words. (*See* Pet. 16-17) This argument does not advance petitioners' position.

As noted above, in *Hepps*, this Court created a "constitutional requirement" that "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." *Hepps*, 475 U.S. at 776-777. Therefore, if such speech is indeed provably false, then it falls within an unprotected category. In cases where such constitutionally required categories exist, this Court "has regularly conducted an independent review of the

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12. It should be noted that, in so ruling, the Supreme Court of Michigan was careful to define the scope of independent review in narrow terms. *See* footnote 7, *supra*.

record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits." *Bose*, 466 U.S. at 505 (1983).

This is precisely how the Michigan Supreme Court defined its mission. The court below concluded that "the task of the reviewing appellate court in a libel case is . . . to independently examine the record as a whole to insure that the burden of proof with respect to falsity has been satisfied . . ." (Pet. App. A-26, n.17) Absent such an examination, it is impossible to discern how a reviewing court could ensure that the speech at issue falls within the unprotected category and "ensure that true speech on matters of public concern is not deterred . . . ." *Hepps*, 475 U.S. at 776-777 (1985).

Petitioners also cite *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991), a summary judgment case. *Masson* does not support petitioners' position concerning independent appellate review. Nothing in *Masson* indicates that an appellate court should refuse to review a plaintiff's ability to prove falsity. To the contrary, in *Masson* this Court reviewed the falsity issue and affirmed the summary dismissal of several of plaintiff's libel claims based on his failure to prove material falsity.

Petitioners further argue that "since publication by the media appears to create a presumption that the material is of public concern," the duty of independent appellate review "extends to *every* jury verdict in *every* libel action involving a media defendant." (Pet. 17) (emphasis in original). This argument is wholly unfounded. In *Hepps*, 475 U.S. at 776, this Court held that newspaper articles that stated the plaintiffs had links to organized crime were "of public concern." The articles at issue in this case are similarly "of public concern." Neither this Court, nor the Supreme Court of Michigan, have endorsed a principle

that would lead to the ominous results forecast by petitioners.

Finally, petitioners argue that independent appellate review is not necessary because "[w]here a properly instructed jury . . . has found the defendant's statements to be false, any constitutionally inspired solicitude for the defendant's speech should vanish . . ." (Pet. 18) This argument suggests that the function of an appellate court is simply to examine the jury instructions and, if they suffice, rubber-stamp the verdict. Such a "review" would scarcely be a review at all, would certainly fail to afford the type of protection to free speech that is envisioned by *Hepps*, and is utterly inconsistent with the language and spirit of *Bose*.[13] This spirit is exemplified in this Court's rejection of attempts to insulate jury verdicts in obscenity cases from appellate review:

> Similarly, although under *Miller v. California*, 413 U.S. 15 (1973), the questions of what appeals to "prurient interest" and what is "patently offensive" under the community standard obscenity test are "essentially questions of fact," *id.*, at 30, we expressly recognized the "ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," *Id.* at 25. We have therefore rejected the contention that a jury finding of obscenity *vel non* is insulated from review so long as the jury was properly instructed and there is some evidence

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13. Petitioners argue that certiorari should be granted to resolve a conflict in the lower courts. In support of this position, they cite *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 464 (9th Cir. 1977). This case cannot create a conflict with the Michigan Supreme Court's interpretation of *Hepps*, since *Maheu* predates *Hepps* by nine years. The other cases cited by petitioners (*see* Pet. 26) do not address the constitutional falsity element but, rather, address common law elements of a defamation claim, such as negligence and damages.

> to support its findings, holding that substantive constitutional limitations govern.

Bose, supra, 466 U.S. at 506-507.

C. The Right to Trial by Jury Is Not Implicated in This Case.

For more than a century, this Court has recognized that the Seventh Amendent, requiring trials by jury, is not binding upon the states. *Walker v. Sauvinet,* 92 U.S. 90 (1875). Petitioners acknowledge as much. (Pet. 20) Petitioners nevertheless argue that this Court should abandon this well-settled principle.

This Court has repeatedly stressed that "the doctine of *stare decisis* is of fundamental importance to the rule of law." *Patterson v. McLean Credit Union,* 491 U.S. 164, 172 (1989). As a result, this Court has never departed from precedent without "special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984).

Petitioners have not offered any such "special justification." Indeed, petitioners base their argument upon the assumption that juries are paricularly qualified to adjudicate matters involving free speech, an assumption that is itself belied by the decisions of this Court. *See, e.g., Bose,* 466 U.S. at 505:

> Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category of [unprotected speech], nor served to eliminate the danger that decisions by triers of fact may inhibit the protection of protected ideas.

See also, Lockhart and McClure, *Censorship of Obscenity, The Developing Constitutional Standards,* 45 Minn. L. Rev. 5 (1960):

> If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free exression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court.

Id. at 119 (cited and quoted in *Jacobellis v. Ohio,* 378 U.S. 184, 188 n.3 (1963) (plurality of opinion of Brennan, J.)).

The Michigan Supreme Court did not invade the province of the jury or deprive the jury of the opportunity to resolve some issue as to which it had special competence. To the contrary, the Supreme Court of Michigan served the precise function assigned to the courts: it fulfilled a constitutional responsibility to review the factual record and insure that protected speech has not been punished.

CONCLUSION

Petitioners, unwilling to allege and unable to prove that the articles at issue contained a single false statement of fact, retreated to their "libel by implication" theory. The Michigan Supreme Court did nothing more than review petitioners' own admissions and the published facts (which petitioners conceded they could not prove false). From this limited review, the Michigan Supreme Court reached the inescapable conclusion that petitioners completely failed to prove falsity of either fact or implication. Petitioners argue that this level of review was improper. To the contrary, it is clear from the decisions of this Court, and from Michigan's own "longstanding" policy of allowing "great latitude" to public interest speech,[14] that any lesser review would fail to ensure that such speech remains robust, wide-open, protected, and undeterred. For the foregoing reasons, the writ should not issue.

Respectfully submitted,

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14. *See* Justice Cavanaugh's concurring opinion, Pet. App. A-58.

APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

STATE OF MICHIGAN
IN THE
SUPREME COURT

Supreme Court

No. 86351

On Appeal from the Court of Appeals First District

JOSEPH JUDEAS LOCRICCHIO and GARY FRANCELL,

Plaintiffs-Appellees,

-vs-

EVENING NEWS ASSOCIATION, MICHAEL WENDLAND and JEAN GADOMSKI,

Defendants-Appellants,

and

PETE WALDMEIR and BILL GILES,

Defendants.

Court of Appeals No. 98002
Wayne County Circuit Court
No. 80 12415 CZ

* * *

Appendix A

[44] JUSTICE ARCHER: What sentences or what was in that — what was said by or written by Mike Wendland, with specificity, was false if there is a statement or paragraph or whatever it is? What do you say in that — in the series of articles are false? I take your case to be false implication.

MR. KENNEY: Absolutely. There's no question about it.

JUSTICE ARCHER: And what I understand, as least what's been argued by defense, is at no time from either request for interrogatories, at no time at trial, at no time before the Court of Appeals, and in your briefs, had you ever said that a particular sentence, word, paragraph, or whatever the case may be, was actually false.

MR. KENNEY: That's — what we have [45] said is that there — that the literal words used is not what we're basing our complaint on; that it is the implication, the juxtaposition, and what have you, of the totality of the articles improperly implies by innuendo, or what have you, a false statement.

* * *